Supreme Court, U.S.
FILED

961119 JAN 13 1997

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

CORNELIUS D. BOYLE, M.D.,

Petitioner,

vs.

COLORADO STATE BOARD
OF MEDICAL EXAMINERS,

Respondent.

**On Petition For Writ Of Certiorari
To The Court Of Appeals
Of The State Of Colorado**

PETITION FOR WRIT OF CERTIORARI

HOCHSTADT, STRAW & STRAUSS, P.C.

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Happ

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Colorado Revised Statutes ("C.R.S.") § 12-36-123 is unconstitutional on its face or as applied, in that under the interpretation given to the statute by the Court of Appeals, the Colorado State Board of Medical Examiners would have jurisdiction to take disciplinary action against a doctor based solely upon the fact that the doctor *once* held a license to practice medicine in Colorado, notwithstanding the fact that the doctor's license is no longer active; notwithstanding the fact that the basis for disciplinary proceedings arose outside the state of Colorado and is unrelated to the practice of medicine; and notwithstanding the fact that the charges were filed against the doctor long after his license expired.

2. Whether or not Petitioner was deprived of procedural due process of law by virtue of the fact that it was known to the Attorney General who prosecuted the case and to the Administrative Law Judge that Petitioner would be unable to attend the hearing, yet no attempt was made to enable him to appear by telephone and the ALJ refused to consider matters submitted on his behalf.

3. Whether or not a non-lawyer can appear before the State Board of Medical Examiners to request a continuance of the hearing on behalf of the subject of the disciplinary proceedings, and if not, whether or not such person can be compelled to testify against the Doctor, without the ability to seek advice of counsel.

LIST OF PARTIES

The Parties to this Petition are:

1. Cornelius Boyle, M.D., Petitioner

2. The Colorado State Board of Medical Examiners, Respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Cornelius Boyle, M.D., respectfully prays that a Writ of Certiorari issue to review the decision of the Colorado Court of Appeals entered in this Case on October 15, 1996.

OFFICIAL REPORT

1. The Order of the State Board of Medical Examiners which revoked Petitioner's license to practice medicine in Colorado was not reported and also is included in the Appendix to this Petition.

2. The Opinion of the Colorado Court of Appeals is published at 1996 WL 74385 (February 22, 1996). Said Opinion is contained in the Appendix to this Petition.

3. The Order of the Court of Appeals denying Petitioner's Petition for Rehearing was not officially reported. Said Order is included in the Appendix to this Petition.

4. The Order of the Colorado Supreme Court denying Petitioner's Petition for Writ of Certiorari was not officially reported. Said Order likewise is included in the Appendix to this Petition.

GROUNDS FOR JURISDICTION

Jurisdiction is invoked for certiorari review under Rule 10, Supreme Court Rules and in particular, Rule 10(b) of said Rules, and under 28 U.S.C.A. § 1257(3). The

Opinion of the Court of Appeals was entered on **February 22, 1996**; the Order denying Petitioner's Petition for Rehearing was entered on **April 11, 1996**. The Order denying Petitioner's Petition for Writ of Certiorari to the Colorado Supreme Court was entered on **October 15, 1996**. This Petition is filed within ninety days following the entry of the Order of the Colorado Supreme Court denying discretionary review as required by Rule 13(1), Supreme Court Rules.

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

The 14th Amendment to the United States Constitution provides in relevant part:

> " . . . nor shall any State deprive any person of life, liberty, or Property, without due process of law . . . "

CONTENTS OF THE STATUTE AT ISSUE

The statute at issue in this proceeding is C.R.S. § 12-36-123, which provided (at the relevant time) as follows:

> "**12-36-123. Procedure - registration - fees.** (1)(a) The board shall establish procedures for the maintenance of licensee lists and the establishment of renewal fees and schedules, which fees and schedules shall be established subject to the provisions of section 24-34-102(8), C.R.S. Every licensee shall pay the secretary a registration fee

to be determined and collected pursuant to section 24-34-105, C.R.S., and shall obtain a registration certificate for the current calendar year.

(b) A licensee desiring to obtain an annual registration certificate shall submit the information necessary to show that he has fulfilled the board's continuing medical education requirements pursuant to paragraph (c) of this subsection (1). Any licensee aggrieved by a decision relating to such continuing education requirements may ask the executive director of the department of regulatory agencies to review such requirements in accordance with the procedures established by section 24-34-102(11), C.R.S.

(c) Applicants for relicensure shall not be required to attend and complete continuing medical education programs, except as directed by the board to correct deficiencies of training or education as directed under section 12-36-118(5)(g)(III)(B).

(2)(a) The secretary shall mail to each such licensee at his last address as shown by the records of the board, during December of each year, notice of the foregoing provisions together with such form of application for registration as may be prescribed by the board. Failure of any licensee to pay the registration fee prescribed by subsection (1) of this section means that the license has lapsed, and the name of any lapsed licensee shall be omitted from such list.

(b) The board shall establish a questionnaire to accompany the renewal form. Said questionnaire shall be designed to determine if the licensee has acted in violation of or has been disciplined for actions that might be construed

as violations of this article or that might make the licensee unfit to practice medicine with reasonable care and safety. Failure of the applicant to answer the questionnaire accurately shall be considered unprofessional conduct as specified in section 12-36-117.

(3) Upon application made to the board by any such licensee on a form prescribed by the board, his license shall be reinstated, subject to the payment to the board of the current renewal fee and a reinstatement fee determined by the board pursuant to section 24-34-105, C.R.S. If, before or after such application for reinstatement has been made, charges are preferred against the licensee by the board or by any person, as provided by section 12-36-118, the board shall defer action on the pending application for reinstatement, if any, and proceed with a hearing on such charges in accordance with section 12-36-118, and thereupon shall reinstate, further suspend, or revoke such license. No license to practice medicine which has lapsed for more than two years shall be reinstated unless the applicant demonstrates to the board his continued professional competence in such manner as prescribed by the board." (Emphasis added)[1]

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[1] The statute in question has been amended since the time that Petitioner's case was pending before the State Medical Board. The Statute as it now exists has deleted subpart (3). Subpart (2) provides, in pertinent part, that "if charges are made against the licensee . . . , the board shall defer action on the pending application for reinstatement and proceed with a hearing on such charges . . . " This clarifies the ambiguity in the old statute as to whether or not charges could be filed against a

STATEMENT OF THE CASE

Cornelius Boyle, M.D. ("Dr. Boyle" or "Petitioner") is an ophthalmologist currently licensed to practice medicine in Kentucky. The last place Dr. Boyle maintained an active medical practice was in Mayfield, Kentucky. Dr. Boyle obtained a license to practice medicine in the State of Colorado in 1986, but he never has practiced medicine or resided in the state of Colorado. Dr. Boyle allowed his Colorado license to lapse through the nonpayment of biannual license fees due in May, 1991.

Formal disciplinary charges were filed against Dr. Boyle in Colorado in 1994 stemming from his conviction for assault in the State of Kentucky, and for other alleged acts of unprofessional conduct. The charges of unprofessional conduct, other than the conviction for assault, were dismissed on motion of the Colorado State Board of Medical Examiners.

Throughout the year 1994, Dr. Boyle was incarcerated in the State of Kentucky. A hearing on the formal complaint occurred on September 28, 1994. At the time of the hearing, Dr. Boyle was unable to attend the hearing in person. At the hearing, Mr. Stephen Wright, a certified public accountant who was the chief financial officer of Dr. Boyle's medical clinic, appeared for the purpose of requesting a continuance on behalf of Dr. Boyle. The Hearing Officer ("ALJ") refused to recognize Mr. Wright in any capacity and denied the motion for continuance

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person whose license has lapsed and who has not applied for reinstatement.

while acknowledging that Dr. Boyle probably would have requested a continuance if he had been present.

No attempt was made to contact Dr. Boyle on September 28, 1994. However, the Assistant Attorney General prosecuting the case was concerned that Dr. Boyle's non-appearance at the hearing might give rise to a claim of due process violation, and he therefore undertook to establish that Dr. Boyle *could* have communicated with the ALJ if he had wanted to do so. In order to prove this point, he called Stephen Wright (the same individual the ALJ previously ruled had no standing in these proceedings) to testify against Mr. Wright's own client in order to establish the ability of Dr. Boyle to communicate from prison. Mr. Wright first requested the ability to consult with his own counsel concerning issues of accountant-client privilege. The ALJ ruled that Mr. Wright had no right to consult with an attorney. Mr. Wright was then interrogated about his ability to communicate with Dr. Boyle. The Prosecutor then called the *ALJ's own clerk* to further establish an ability to communicate with Dr. Boyle. At no time during the hearing was any actual or constructive attempt made to contact Petitioner, and it is not apparent from the record that Dr. Boyle knew or had been informed that he could appear by telephone.

The ALJ, following the hearing, rendered an Initial Decision which found that Dr. Boyle was convicted of a felony in violation of C.R.S. § 12-36-117(1)(f), and that the Board had jurisdiction over the person of Dr. Boyle. He recommended that Dr. Boyle's license to practice medicine in Colorado be revoked. This recommendation was made a final board order on February 9, 1995 over exceptions filed by Petitioner. (Appendix, Pages App. 1-5) Dr.

Boyle appealed said Final Board Order to the Court of Appeals, which affirmed the same in a reported opinion. (Appendix, Pages App. 12-25).

The federal constitutional questions were first raised before the Board by questioning the Board's jurisdiction over the person of the Petitioner. The questions again were raised in the Court of Appeals in the Notice of Appeal which challenged the Board's jurisdiction to discipline a non-resident non-licensee and to conduct a hearing which failed to comport with requirements of due process of law. The Notice of Appeal is included in the Appendix hereto. (Pages App. 6-11). The constitutionality of the statute on federal due process grounds was expressly raised for the first time in oral argument before the Court of Appeals and in the Petitioner's Petition for Rehearing. This question again was raised in the Petition for Writ of Certiorari filed in the Colorado Supreme Court.

REASONS FOR ALLOWANCE OF THE WRIT

This Court should grant Certiorari in this case because the Colorado Court of Appeals has decided a matter of substance, i.e., the jurisdiction of the Board of Medical Examiners over a non-resident non-licensee, which has not heretofore been determined by this Court and which was determined by the Colorado Court of Appeals in a manner which conflicts with the decisions of the courts of other states; and the Court of Appeals has decided other questions of substance, i.e., the necessity to be a licensed attorney to appear before the Board of

Medical Examiners to request a continuance and the due process rights of an incarcerated person in a licensure hearing before a state regulatory agency, that either have not been but should be settled by this Court or were decided in a manner probably not in accord with applicable decisions of the Supreme Court.

In further explanation of the above, Petitioner shows as follows:

A. C.R.S. § 12-36-123(3) UNCONSTITUTIONALLY DEPRIVES PETITIONER OF PROPERTY WITHOUT DUE PROCESS OF LAW.

It is well established that administrative agencies are subject to the due process requirements of the Fourteenth Amendment to the United States Constitution. In specific, doctors who hold licenses to practice medicine have valuable property rights which cannot be taken away without complying with due process requirements. In *Norton v. Colorado State Bd. of Medical Examiners*, 821 P.2d 897 (Colo.App. 1991), the Court held as follows:

> "Procedural due process requires that administrative agencies 'be fundamentally fair to the individual in the resolution of a legal dispute involving governmental action that threatens to deprive an individual of a significant property interest.' deKoevend v. Board of Education, 688 P.2d 219 (Colo.1984). And, a license to practice medicine is a valuable property right which is protected by due process. Prouty v. Heron, 127 Colo. 168, 255 P.2d 755 (1953)."

It is a requirement of due process of law that a person have certain minimum contacts with this state

before the State's power can be brought to bear upon such person. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945).

Under the Court of Appeals' opinion of February 22, 1996, the State Medical Board would have continuing jurisdiction over a medical licensee *ad infinitum*, regardless of whether or not that licensee's license was revoked, suspended or allowed to lapse, regardless of whether or not that licensee ever practiced medicine in this state. In this action, the contacts between the licensee and the State of Colorado are very tenuous – the charges against the licensee were not pending at the time his license was allowed to lapse; the charges did not stem from any activity in the State of Colorado, and the charges did not even stem from the practice of medicine, which is the only basis over which the State of Colorado (or at least the State Board of Medical Examiners) has *any* jurisdiction over the Petitioner. It has been held in *Covia v. Robinson*, 507 N.W.2d 411, 414 (Iowa 1993) that the Fourteenth Amendment requires minimum contacts in an administrative law setting (there, worker's compensation); and in *Stern v. Connecticut Medical Examining Board*, 545 A.2d 1080, 1084 (Conn. 1988), that the voluntary surrender of a license by the licensee before any charges are pending against him divests the Board of jurisdiction.

The statutory scheme of the Medical Practices Act, C.R.S. § 12-36-101, *et seq.*, is to protect the people of the State of Colorado against "unauthorized, unqualified, and improper practice of the healing arts *in this state*, and this article shall be construed in conformity with this declaration of purpose." C.R.S. § 12-36-102 (emphasis added). It is not the function of the Colorado State Board

of Medical Examiners to protect the people of any other state. Hence, it was not contemplated by the legislature to regulate the activities of a person who is not practicing the healing arts in Colorado and who does not hold a license to practice in Colorado. Such a person poses no threat to the people of the State of Colorado. It sets a dangerous precedent to allow a Board to continue to exercise jurisdiction over a nonlicensee long after the ex-licensee has moved out of the state. If the Board retains continuing jurisdiction over one-time licensees, for how long does this jurisdiction continue? Forever? It is suggested that even if the Board were to retain jurisdiction over a licensee in perpetuity, such jurisdiction could only be exercised for acts which were committed by the licensee in Colorado, which is not the case here.

As a reinforcement to Petitioner's position, C.R.S. § 12-36-123 was amended after charges were filed against the Petitioner. The current version of C.R.S. § 12-36-123 is instructive of the legislative intent of the old version of the statute. The new version eliminates the words, "before or after" from the sixth line of subsection (3), and the words, "if any," from the tenth line of the statute after the words "pending application for reinstatement." It was these words that caused the old version of the statute to be ambiguous as to whether or not the legislature intended the Board to be able to commence disciplinary proceedings against an ex-licensee who has not applied for reinstatement. It is now clear that the Board only considers charges against a physician holding a lapsed license at the time that the physician applies for readmission. See Footnote 1, *supra*.

Further, the Colorado Courts' interpretation of the statute could lead to an absurd result – the reinstatement of the license of a person who has not requested reinstatement.

In short, the Court's interpretation of the statute renders it void as unconstitutional, and causes a result which is not only absurd but contrary to the legislative intent and which deprived Dr. Boyle of a valuable property right without due process of law. Even though Dr. Boyle's situation is very unusual, the principle involved, i.e., the exercise of jurisdiction by a state regulatory agency over a nonresident nonlicensee, has widespread application. The Colorado courts decided this issue contrary to the Courts of the state of Connecticut (*Stern v. Connecticut Medical Examining Board, supra*). Accordingly, this Court should grant the within Petition and reverse the Court of Appeals.

B. THE COURT OF APPEALS OVERLOOKED THE FACT THAT PETITIONER WAS INCARCERATED AT THE TIME OF HEARING AND COULD NOT APPEAR, YET THE ALJ TOOK NO STEPS TO FACILITATE AN APPEARANCE BY PETITIONER.

It seems relatively axiomatic that due process requires, at a minimum, notice and an opportunity to be heard. *Colorado State Board of Medical Examiners v. Cornelius D. Boyle,* 1996 WL 74385 (Colo.App. 1996). The opportunity must be to be heard at a meaningful time and in a meaningful manner. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 84 L.Ed.2d 494 (1985).

Under the totality circumstances of this case, and as a matter of fairness, the ALJ should have attempted to contact Dr. Boyle to allow him to participate in the hearing. The ALJ knew that Dr. Boyle could not be present. Great pains were taken to establish that he *could* have participated in the hearing, yet no effort was made to enable him to do so. Under the totality of circumstances, Dr. Boyle was deprived of procedural due process of law.

Dr. Boyle had a theoretical right to appear in this case but he had no practical ability to do so. It is not apparent from the record that Dr. Boyle even knew that he could appear at the hearing by telephone or that the hearing room was equipped with telephone equipment to accommodate or enable such an appearance. The Court of Appeals determined this issue in a way probably not in accord with prior decisions of this Court.

C. THE COURT OF APPEALS OVERLOOKED THE FACT THAT MR. WRIGHT DID NOT NEED TO BE A LICENSED ATTORNEY TO REQUEST A CONTINUANCE ON BEHALF OF DR. BOYLE.

Under *Unauthorized Practice of Law Committee of the Supreme Court of Colorado v. Employers Unity, Inc.*, 716 P.2d 460 (Colo. 1986), and *Denver Bar Association v. Public Utilities Commission*, 154 Colo. 273, 391 P.2d 467, 471 (1964), the Colorado Supreme Court expressly held that one does not need to be a licensed attorney in order to appear for certain enumerated purposes before a state administrative agency. The basic rule enumerated in these cases is that if the matter for which the lay person

appears is one "in which no legal principle is involved", then a lay person can appear before an agency on behalf of another. In the present case, Mr. Wright "appeared" for Dr. Boyle for the purpose of requesting a continuance of the hearing. No legal principles were involved in this request. No legal advice was given to Dr. Boyle. No legal arguments were advanced on Dr. Boyle's behalf. The ALJ intimated that if Dr. Boyle had requested a continuance, then he could have determined if a continuance were warranted. Therefore, the entire underpinning of the hearing was that Mr. Wright needed to be a lawyer before a continuance could be requested; since none was requested, none could be granted, and the hearing proceeded.

It is submitted that Dr. Boyle had more than ample grounds to request a continuance, and a denial of a continuance would have been an abuse of discretion. He could not be present; he had insufficient ability to find an attorney in Colorado to represent him; his written response to the charges was disallowed by the ALJ without Petitioner's knowledge. In short, Dr. Boyle should have been granted a continuance, and Mr. Wright should have been allowed to request a continuance on Dr. Boyle's behalf. This issue was resolved by the Court of Appeals in a way probably not in accord with the decisions of this Court, or this issue has not been but should be settled by this Court, and the Court should grant certiorari to review the decision of the Colorado Court of Appeals.

WHEREFORE, Petitioner prays that this Court grant Certiorari to review the Opinion of the Colorado Court of Appeals, for a reversal of said Opinion, and for such

other and further relief as to the Court seems just and proper in the premises.

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BEFORE THE STATE BOARD OF MEDICAL EXAMINERS

STATE OF COLORADO

ME 94-06

FINAL BOARD ORDER

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS REGARDING THE LICENSE TO PRACTICE MEDICINE IN THE STATE OF COLORADO OF CORNELIUS D. BOYLE, M.D., LICENSE NO. 27279,

Respondent.

This matter came before Hearing Panel A of the Colorado State Board of Medical Examiners ("the Hearing Panel") for review of the initial decision of Administrative Law Judge Marshall A. Snider ("the ALJ") issued in the above referenced case on October 6, 1994. That decision is incorporated by reference as though fully set forth herein.

On November 9, 1994 Respondent filed a Designation of Record.

On November 16, 1994 Respondent filed exceptions to the initial decision.

On November 21, 1994 Petitioner Inquiry Panel B filed a response to Respondent's exceptions.

On December 6, 1994 Respondent thereupon filed amended exceptions and replied to Petitioner Inquiry Panel B's response to Respondent's exceptions.

On December 15, 1994 Petitioner Inquiry Panel B filed a response to Respondent's amended exceptions and Panel's motion to strike matters outside the hearing record.

On January 18, 1994 Hearing Panel A considered the initial decision of the ALJ, the subsequent pleadings filed by the parties as noted above and the designated portions of the hearing record. Present during deliberations was conflicts counsel from the Office of the Attorney General. After due consideration, and otherwise being advised in the premises, Hearing Panel A, pursuant to Sections 12-36-118 (5)(g)(III) and 24-4-105, C.R.S., unanimously makes the following findings and conclusions and enters its final board order:

1. The findings of fact are supported by the record and are affirmed and adopted by the Hearing Panel.

2. The ALJ's conclusions of law are supported by the record, and are affirmed and adopted by the Hearing Panel.

3. Respondent's exceptions to the initial decision of the ALJ are not supported by the record and are rejected by the Hearing Panel.

a. Respondent alleges that the Board lacked jurisdiction because he was not present or represented at the administrative hearing. This claim must be rejected. Respondent was afforded proper notice and had the opportunity to retain counsel. He failed to obtain licensed counsel, and attempted to seek representation through a lay person. Such representation is not permitted. *See People v. La*

Porte Church of Christ, 830 P.2d 1150 (Colo. App. 1992)

b. Because notice was proper in this case the ALJ could proceed with the hearing without denying Respondent due process of law. *See Sauers v. Heche*, 34 Colo. App. 217, 524 P.2d 1387 (1970).

c. Respondent also contends that the agency could not revoke his license on the basis of his felony conviction in Kentucky because his conviction is on appeal. There was no evidence in the record that the conviction is on appeal. In any case, a conviction means the establishment of guilt by a plea or verdict. *People v. Allire*, 843 P. 2d 38,41 (Colo. App. 1992). Respondent does not dispute a verdict was entered against him. Therefore, he was convicted of a felony.

d. The Hearing Panel, having reviewed the evidence, determines that Respondent could have received and made telephone calls.

e. The Hearing Panel further finds it has subject matter jurisdiction pursuant to *Cross v. State Board of Dental Examiners*, 552 P.2d 38 (Colo. App. 1976).

f. A felony includes any crime in a sister state which carries with it a possible penalty of incarceration in that state's penitentiary. *People v. Lacey*, 166 Colo. 152, 442 P. 2d 402 (1968).

4. Petitioner Inquiry Panel B's motion to strike matters outside the hearing record is granted.

5. The Colorado medical license of Cornelius D. Boyle, M.D., is hereby REVOKED.

This decision becomes final upon mailing. Any party adversely affected or aggrieved by any agency action may commence an action for judicial review before the Court of Appeals within forty-five (45) days after such action becomes effective. Reference Sections 24-4-106(11) and 12-36-119(2), C.R.S.

Dated and signed this 9th day of February, 1995.

FOR THE COLORADO STATE BOARD OF MEDICAL EXAMINERS
HEARING PANEL A

/s/ Illegible
Member

/s/ Jane A Kennedy
Member

/s/ Renée A. Illegible
Member

/s/ Illegible
Member

/s/ Illegible
Member

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of March, 1995, placed a true and correct copy of the Final Board Order regarding the license to practice medicine of Cornelius D. Boyle, M.D., in the United States mail, postage paid thereon, addressed to:

Richard S. Strauss, Esq.
2043 York Street
Denver, CO 80205

Robert N. Spencer, Assistant Attorney General
Colorado Department of Law
Regulatory Law Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

/s/ Joyce M. Echelmeier
Joyce M. Echelmeier
Secretary

FOR THE COLORADO STATE BOARD OF MEDICAL EXAMINERS

IN THE COLORADO COURT OF APPEALS

Case No. 95CA507

NOTICE OF APPEAL FROM THE FINAL BOARD ORDER OF HEARING PANEL A OF THE COLORADO STATE BOARD OF MEDICAL EXAMINERS IN MATTER NO. ME 94-06

IN THE MATTER OF THE DISCIPLINARY PROCEEDING REGARDING THE LICENSE TO PRACTICE MEDICINE IN THE STATE OF COLORADO,

THE COLORADO STATE BOARD OF MEDICAL EXAMINERS,

Complainant-Appellee,

vs.

CORNELIUS D. BOYLE, M.D., License No. 27279,

Respondent-Appellant.

(Filed March 30, 1995)

RESPONDENT-APPELLANT, by and through his attorneys, HOCHSTADT, STRAW & STRAUSS, P.C., hereby gives notice of his appeal from the Final Board Order entered by Hearing Panel A of the Colorado State Board of Medical Examiners in the above-captioned matter.

I. NATURE OF THE CASE

A. NATURE OF THE CONTROVERSY

Cornelius Boyle, M.D. is an opthalmologist licensed to practice medicine in Maryland and Kentucky. In 1986, Dr. Boyle was contemplating a move to Colorado and obtained a license to practice medicine in Colorado as well. Dr. Boyle subsequently determined not to move to Colorado and moved to Kentucky instead. Dr. Boyle never has practiced medicine in Colorado, and in 1991, Dr. Boyle elected to allow his license to practice medicine to lapse for nonpayment of current license fees.

On April 8, 1991, Dr. Boyle was convicted of violation of Kentucky Revised Statutes §508.010(1)(b), first degree assault. Dr. Boyle has been incarcerated in Kentucky since that time for said offense. Dr. Boyle's conviction is on appeal in the State of Kentucky.

Based solely upon this conviction, the Colorado State Board of Medical Examiners commenced proceedings for the revocation of Dr. Boyle's license to practice medicine in Colorado. On September 28, 1994, a hearing was held before Hearing Officer Marshall A. Snider. Dr. Boyle was not present at the hearing due to his incarceration in Kentucky. No attempt was made to contact Dr. Boyle by telephone for said hearing. A representative of Dr. Boyle, Mr. Stephen Wright, C.P.A., who was an officer of Dr. Boyle's professional eye clinic, appeared at the hearing to request a continuance so that Dr. Boyle could appear by telephone or through counsel. The hearing officer refused to allow Mr. Wright to appear in any capacity on behalf of Dr. Boyle, and then allowed the Attorney General who was prosecuting this matter to call Mr. Wright in his case

in chief to establish the fact that Dr. Boyle could have appeared at the hearing had he chosen to do so.

Based upon the conviction, Mr. Snider recommended the revocation of Dr. Boyle's medical license. This recommendation was approved and ordered by Hearing Panel A of the Colorado State Board of Medical Examiners by written Final Board Order dated February 9, 1995.

B. ORDER BEING APPEALED AND BASIS FOR THE APPELLATE COURT'S JURISDICTION

The Order being appealed is the Final Board Order dated February 9, 1995. The basis for this Court's jurisdiction is C.R.S. §12-36-119; §24-4-106; and Rule 3, Colorado Appellate Rules.

C. WHETHER THE ORDER RESOLVED ALL ISSUES PENDING BEFORE THE AGENCY

The Order being appealed resolved all issues pending before the Colorado State Board of Medical Examiners.

D. WHETHER THE ORDER IS FINAL FOR PURPOSES OF APPEAL

The said Order is final for purposes of appeal, having been mailed on February 14, 1995.

E. THE DATE OF SERVICE OF THE FINAL ORDER ENTERED IN THE ACTION BY THE AGENCY.

The Final Board Order was served by mailing on February 14, 1995.

II. ADVISORY LISTING OF ISSUES ON APPEAL

1. Whether or not Respondent's conviction in Kentucky constitutes a basis for the revocation of his license to practice medicine in Colorado;

2. Whether or not the Colorado State Board of Medical Examiners had jurisdiction over the Respondent due to the fact that his license to practice medicine was inactive and his conviction in Kentucky was entered after his license became inactive;

3. Whether or not the "hearing" before Hearing Officer Snider accorded Respondent due process of law based upon the following non-inclusive grounds: Respondent had no practical ability to participate in the hearing; Respondent's representative was not allowed to request a continuance; Respondent's representative was called as a material witness in the People's case in chief; and the notice of the hearing to Respondent did not advise him that if he did not appear, his license would be revoked.

4. Whether or not the Hearing Officer's findings were supported by competent evidence in the record.

III. TRANSCRIPT INFORMATION

The transcript of the "evidence" taken before the agency is necessary to resolve the issues raised on appeal.

The Transcript is 42 pages long, and has been obtained by the Respondent.

IV. COUNSEL INFORMATION

Counsel for the parties are as follows:

FOR THE RESPONDENT-APPELLANT

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No. 7916
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FOR THE COMPLAINANT-APPELLEE

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V. APPENDIX

The appendix hereto contains a copy of the following:

1. Final Board Order dated February 9, 1995

2. Initial Decision of the Hearing Officer dated October 6, 1994.

Dated: March 30, 1995.

Respectfully submitted,

HOCHSTADT, STRAW & STRAUSS, P.C.

By: /s/ Richard S. Strauss
Richard S. Strauss,
No. 7916
Attorneys for
Respondent-Appellant
2043 York Street
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CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on March 30, 1995, I served the above and foregoing by depositing a true and correct copy thereof in the United States Mails, postage prepaid thereon, addressed to:

Robert N. Spencer
Office of the Attorney General
1525 Sherman St., 5th Floor
Denver, Colorado 80203

Colorado State Board of Medical Examiners
Department of Regulatory Agencies
1560 Broadway, Suite 1300
Denver, Colorado 80202-5140

/s/ Carla Salazar

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. A PETITION FOR REHEARING IN THE COURT OF APPEALS OR A PETITION FOR CERTIORARI IN THE SUPREME COURT MAY BE PENDING.

COLORADO STATE BOARD
OF MEDICAL EXAMINERS,
Appellee,

v.

Cornelius D. BOYLE, Respondent-Appellant.

No. 95CA0507.
Colorado Court of Appeals,
Div. 5.
February 22, 1996.

Physician appealed revocation of his license to practice medicine by State Board of Medical Examiners. The Court of Appeals, Kapelke, J., held that: (1) Board had subject matter and personal jurisdiction; (2) hearing before administrative law judge met statutory and constitutional requirements; and (3) physician's conviction outside of state was a conviction of a felony.

Affirmed.

Appeal from the Colorado State Board of Medical Examiners, No. ME 94-06.

Gale A. Norton, Attorney General, Stephen K. ErkenBrack, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Robert N. Spencer, Assistant Attorney General, Denver, for Appellee.

Hochstadt, Straw & Strauss, P.C., Richard S. Strauss, Denver, for Respondent-Appellant.

Opinion by Judge KAPELKE.

Respondent, Cornelius D. Boyle, appeals from a final order of the Colorado State Board of Medical Examiners (the Board) revoking his license to practice medicine. We affirm.

Respondent, an ophthalmologist, obtained a license to practice medicine in Colorado in 1986. His license remained active until May 31, 1991, when it lapsed for nonpayment of the biannual license renewal fee.

In 1991, while practicing in Kentucky, respondent was convicted of wanton first degree assault, a felony, and sentenced to imprisonment for a maximum term of ten years.

Upon learning of respondent's conviction, the Board initiated disciplinary proceedings under the Medical Practice Act (MPA), § 12-36-118, C.R.S. (1991 Repl.Vol. 5B). On June 6, 1994, the formal complaint of the attorney general, a notice and citation, and a notice to set were hand delivered to respondent at the county jail in Kentucky.

On June 20, a certified public accountant who was also an officer of the Boyle Eye Clinic, a Kentucky corporation, notified the attorney general by letter that respondent requested that no action be taken against his medical license until he had an opportunity to defend himself. Attached to this letter was another letter, apparently signed by the accountant on respondent's behalf, claiming that respondent had not been properly served, disputing all allegations in the formal complaint, and

requesting that no hearing be held until respondent was released from incarceration.

Pursuant to a motion by the attorney general, the Administrative Law Judge (ALJ) issued an order determining that the letter was not an answer to the formal complaint. This order was mailed to respondent at the county jail on July 7 and remailed to him on July 21 at the correctional facility in Kentucky to which he had been relocated.

On July 24, the Division of Administrative Hearings setting clerk phoned respondent at the correctional facility and set a hearing for September 28 and 29. A notice of the hearing was mailed to respondent at the correctional facility on July 25.

Respondent did not file an answer to the formal complaint. The accountant, however, filed a purported answer, a "response," and a motion to continue.

The ALJ held a hearing on September 28. Respondent, still incarcerated, did not participate personally or through counsel. The accountant was present and moved to continue the hearing and to intervene. The ALJ denied both motions. At the Board's request, the accountant and the setting clerk testified briefly as to their having been able to communicate with the respondent by telephone. Documentary evidence was introduced at the hearing regarding respondent's indictment and conviction, his appeal, and pertinent Kentucky law.

The ALJ concluded that the Board had jurisdiction over the respondent and his license to practice medicine and that respondent was in violation of § 12-36-117(1)(f),

C.R.S. (1991 Repl.Vol. 5B), which defines unprofessional conduct as "[c]onviction of a felony," thereby subjecting respondent to Board discipline pursuant to § 12-36-118(5)(g)(III), C.R.S. (1991 Repl.Vol. 5B). Noting that respondent could reapply for licensure upon his release from prison, the ALJ recommended revocation of respondent's license.

Pursuant to the Administrative Procedure Act (APA), § 24-4-105(14)(a)(II), C.R.S. (1995 Cum.Supp.), respondent sought review by the Board. The Board considered the initial decision and respondent's exceptions pursuant to § 24-4-105(15), C.R.S. (1995 Cum.Supp.). Following review, the Board issued a final order adopting the ALJ's findings of fact and conclusions of law, rejecting respondent's exceptions, and revoking respondent's license to practice medicine in Colorado. Thereafter, respondent filed this appeal.

I.

A.

Respondent first argues that the Board erred in finding that it had subject matter jurisdiction. The crux of his argument is that, under § 12-36-123(3), C.R.S. (1991 Repl.Vol. 5B) (deleted by amendment, effective July 1, 1995), the Board lacked authority to act on a lapsed license. We disagree.

Section 12-36-123, C.R.S. (1991 Repl.Vol. 5B) grants the Board general authority to establish and monitor the procedural aspects of new, active, and lapsed medical licenses. As relevant here, the statute specifies that nonpayment of registration fees prescribed by the Board

results in the lapse of a license, reinstatement of which may be subject to conditions set by the Board. At the times pertinent here, § 12-36-123(3) provided:

> Upon application made to the board by any such licensee . . . his license shall be reinstated . . . If,before or after such application for reinstatement has been made, charges are preferred against the licensee by the board or by any person, as provided by section 12-36-118, the board shall defer action on the pending application for reinstatement, *if any*, and proceed with a hearing on such charges in accordance with section 12-36-118 and thereupon shall reinstate, further suspend,or revoke such license. (emphasis added)

Although respondent concedes that § 12-36-123 authorizes the Board to place conditions on a lapsed license, he argues that under § 12-36-123(3) the Board has authority to proceed with a hearing on charges against a "lapsed" licensee only after the licensee has applied for reinstatement of the license. Therefore, respondent argues, because he has not sought reinstatement, the Board lacked jurisdiction to revoke his lapsed license.

Respondent's analysis ignores the General Assembly's inclusion of the phrases "before or after" and "if any" with reference to such applications. These phrases indicate an intent that the Board have jurisdiction to act with respect to a lapsed license both before and after filing of an application for reinstatement. Accordingly, we conclude that § 12-36-123(3) is susceptible of more than one interpretation.

The court's primary task in this situation is to ascertain and give effect to the intent of the General Assembly. *People v. District Court,* 713 P.2d 918 (Colo.1986). If, as here, the statute is part of a comprehensive legislative program, we must, in ascertaining legislative intent, consider the balance of the enactments relating to the same subject matter. *Danielson v. Castle Meadows, Inc.,* 791 P.2d 1106 (Colo.1990).

Here, two provisions of the MPA are instructive in determining legislative intent. Section 12-36-102, C.R.S. (1991 Repl.Vol. 5B) declares that the purpose of the MPA is to regulate and control the practice of medicine in order to protect the public against unauthorized, unqualified, and improper practice of the healing arts. This declaration has been construed as authorizing the Board to act in the public interest even in the absence of injury or actual harmful effect on a medical practice. *Colorado State Board of Medical Examiners v. Hoffner,* 832 P.2d 1062 (Colo.App.1992). Indeed, as stated in *Dixon v. State Board of Optometric Examiners,* 39 Colo.App. 200, 204, 565 P.2d 960, 963 (1977):

> If the concept of licensing practitioners dealing with public health is to have any vitality and purpose beyond providing a certificate suitable for framing, it is unreasonable to require proof of injury to a patient before approving revocation of a license.

Additionally, § 12-36-118 expressly grants the Board authority to initiate investigations and disciplinary actions against any physician licensed or authorized to practice medicine in the state, not only in response to

written complaints but also "on its own motion." Section 12-36-118(4)(a), C.R.S. (1991 Repl.Vol. 5B).

These statutory provisions, when read in conjunction with the Board's general authority under § 12-36-123 to establish and monitor new, active, and lapsed licenses, leads us to conclude that respondent's interpretation of § 12-36-123(3) is contrary to that intended by the General Assembly.

We thus conclude that § 12-36-123(3) authorized the Board to prefer charges against a physician whose license had lapsed and that such authority was not dependent upon the prior filing of an application for reinstatement. Accordingly, the Board did not err in concluding that it had jurisdiction.

B.

Alternatively, respondent contends that the Board lacked personal jurisdiction. The thrust of his argument is that he had insufficient "minimum contacts" with the state of Colorado to support jurisdiction by the Board. Again, we disagree.

By applying for and obtaining a license to practice medicine in this state, a physician consents and submits to the jurisdiction of the Board with respect to proceedings concerning such license. Further, obtaining a license to practice medicine is a sufficient contract with the state to satisfy due process requirements. Hence, if respondent was properly served, he was subject to the Board's personal jurisdiction. *See United Bank v. Buchanan*, 836 P.2d 473 (Colo.App.1992).

Here, the record reveals that respondent was personally served in accordance with § 12-36-118(5)(b), C.R.S. (1991 Repl.Vol. 5B). Thus, the Board had jurisdiction over respondent and could proceed with respect to his lapsed license.

II.

Respondent next contends that the Board erred in concluding that the hearing before the ALJ met statutory and constitutional requirements. We disagree.

A.

First, respondent argues that notice of the September hearing failed to apprise him of the nature and purpose of the hearing and of his rights.

Due process requires that a respondent be notified of the nature of the proceedings and apprised of the right to present evidence in his or her own behalf. *Norton v. Colorado State Board of Medical Examiners*, 821 P.2d 897 (Colo.App.1991). This due process standard is defined for purposes of administrative agency action in § 24-4-105(2)(a), C.R.S. (1995 Cum.Supp.) which provides:

> Any person entitled to notice of a hearing shall be given timely notice of the time, place, and nature thereof, the legal authority and jurisdiction under which it is to be held, and the matters of fact and law asserted.

The record reveals that these criteria were met here. Consistent with § 12-36-118(5), C.R.S. (1991 Repl.Vol. 5B), respondent received by June 6 a notice and citation and a

notice to set with a copy of the formal complaint. These documents informed respondent that he had been charged with unprofessional conduct on several grounds including conviction of a felony and that a hearing would be held before an ALJ to determine whether he had, as alleged in the complaint, engaged in unprofessional conduct and whether his license to practice should be revoked or suspended, or whether he should be otherwise disciplined. The documents contained citations to the applicable provisions of the MPA and the APA, as well as the text of the relevant MPA provisions. By these documents, respondent was also apprised of his obligation to file an answer within twenty days and of his rights to appear in person with legal counsel, to cross-examine witnesses, and to present evidence in his own behalf.

Considered along with the notice respondent received following the telephone setting, these documents timely and adequately apprised respondent of the nature and purpose of the hearing and of his rights in regard to that hearing.

B.

Respondent further contends that the state violated his right to be heard and meaningfully participate in the hearing. We disagree.

The Board did not violate any statutory rights of respondent in proceeding with the hearing despite his incarceration outside the state. Section 12-36-118(5)(c), C.R.S. (1991 Repl.Vol. 5B) provides that it is the duty of

the physician charged to file an answer to a formal complaint with the Board. Further, § 12-36-118(5)(d), C.R.S. (1991 Repl.Vol. 5B) provides that the Board may proceed to hear the complaint if the physician fails to answer or appear at the hearing. Moreover, inasmuch as § 12-36-118(5)(e), C.R.S. (1991 Repl.Vol. 5B) states only that "the physician *may* be present in person, and by counsel if he so desires," the statute does not require that a physician be present at the hearing. *See Norton v. Colorado State Board of Medical Examiners, supra.*

Accordingly, in light of this statutory scheme, the dispositive issue becomes whether respondent was denied his due process right to an opportunity to be heard "at a meaningful time and in a meaningful manner." *See In re Marriage of Finer,* 893 P.2d 1381 (Colo.App.1995). We conclude that respondent's due process rights were not violated.

In *Norton v. Colorado State Board of Medical Examiners, supra,* a panel of this court considered whether a physician's right to an opportunity to be heard was violated by an ALJ's order prohibiting the physician from testifying at his disciplinary hearing because of discovery violations. In determining that the physician, by declining to comply with discovery orders, had deliberately chosen not to exercise his opportunity to be heard, the court concluded:

> [D]ue process requires only that the respondent have an *opportunity* to be heard. It does not mandate that the respondent, in fact, *be* heard if he or she does not choose to take advantage of this opportunity.

Norton v. Colorado State Board of Medical Examiners, supra, 821 P.2d at 901-902 (emphasis in original).

Courts in other jurisdictions have proceeded under a similar analysis in circumstances involving a physician's absence from a license revocation hearing. In *Laverne v. Sobol,* 149 A.D.2d 758, 539 N.Y.S.2d 556 (1989), the court ruled that when a physician had been notified of the disciplinary hearing and had been afforded an opportunity to be heard, his right to due process was not violated even though physical and emotional incapacities precluded his attendance at his disciplinary hearing. *See also Reed v. Ohio State Medical Board,* 40 Ohio App.3d 124, 532 N.E.2d 189 (Ohio App.1988) (because the physician had received proper notice of the hearing informing him of the reasons for the medical board's proposed action and of his right to request and appear in person or with an attorney at the hearing, his absence did not deprive him of due process or a fair hearing); and *Rinaldo v. Board of Medical Examiners,* 82 Cal.App.2d 213, 186 P.2d 26 (1947) (notice alone was sufficient to protect physician's rights where physician could have taken steps to protect his rights). *But see State v. Davis,* 143 Fla. 236, 196 So. 491 (1940) (when statute contemplates the accused shall have the right to appear at the hearing, physician's constitutional rights infringed when incarceration left him powerless to attend the proposed hearing). *See generally* Annot., 10 A.L.R.5th 111-117 (1993).

We conclude that, under the analysis set forth in *Norton v. Colorado State Board of Medical Examiners, supra,* when, as here, a respondent's absence from the disciplinary hearing results from incarceration in a foreign jurisdiction, that respondent's right to due process is not

violated if opportunity was afforded to participate in the hearing at a meaningful time and in a meaningful manner. We conclude that respondent had such an opportunity here.

In early June, respondent was put on notice that he had a duty to respond to the complaint. In July, many months before the hearing, the ALJ informed respondent that his initial letter of June 20 would not be considered as an answer to the formal complaint or as a motion for a continuance, and that he would be given thirty days to respond. Additionally, respondent was apprised that either he or an attorney entering an appearance on his behalf must sign all pleadings and that, if an attorney not licensed in Colorado were to enter an appearance, such attorney would have to move for special admission pursuant to C.R.C.P. 221.1. Despite these several notices, respondent failed to exercise his opportunities to be heard.

Respondent could have submitted his position in writing, either with or without the assistance of counsel; he could also have been represented by counsel at the hearing and could have requested the opportunity to participate in the hearing by telephone. He did not avail himself of any of these opportunities.

Accordingly, we hold that respondent was not denied the opportunity to be heard at a meaningful time and in a meaningful manner.

Respondent also argues that the hearing lacked "basic fairness" because the ALJ failed to accept the several pleadings filed by the accountant or allow the

accountant to represent respondent at the hearing. We reject this argument.

It was undisputed that the accountant was not an attorney. Thus, he could neither submit pleadings nor present arguments before the ALJ. *See People v. LaPorte Church of Christ,* 830 P.2d 1150 (Colo.App.1992).

Moreover, we reject respondent's argument that the accountant, as an officer of the Boyle Eye Clinic, should have been recognized as respondent's agent and permitted to participate on his behalf. The clinic was not a party before the Board.

In addition, respondent argues that it was fundamentally unfair for the ALJ to deny the accountant standing, but then to compel him to testify without advice of counsel. We disagree.

Section 24-4-105(9), C.R.S. (1995 Cum.Supp.) provides that any party compelled to testify shall be entitled to the benefit of legal counsel. However, a review of the record reveals that the essence of the accountant's testimony was that he had been able to communicate with respondent despite respondent's incarceration. Since the testimony of the administrative clerk had also established this fact, we conclude that the accountant's testimony was merely cumulative. Hence, any error by the ALJ in requiring the accountant to testify was harmless under the circumstances here.

Therefore, we conclude that the proceedings before the ALJ did not violate respondent's statutory rights under the MPA or his due process rights.

III.

Finally, respondent contends that the Board erred in concluding that there was evidence to support a conclusion that he had been convicted of a felony in violation of § 12-36-117(1)(f). The essence of respondent's argument is that the offense for which he was convicted in Kentucky is not a felony in Colorado. We disagree.

Under Colo. Const. art. XVIII, § 4, any crime in a foreign jurisdiction which carries with it a possible penalty of incarceration in the state penitentiary is a felony in Colorado. *Lacey v. People*, 166 Colo. 152, 442 P.2d 402 (1968). Respondent's conviction for wanton assault in the first degree was punishable by imprisonment for ten years in the Kentucky penitentiary and was therefore a conviction of a felony for the purposes of § 12-36-117(1)(f).

The order of the Board is affirmed.

STERNBERG, C.J., and ROTHENBERG, J., concur.

THE COURT OF APPEALS OF
THE STATE OF COLORADO

Case Number 95CA0507

ORDER

COLORADO STATE BOARD OF MEDICAL EXAMINERS
V CORNELIUS D. BOYLE

Upon consideration of the Petition for Rehearing filed by the Appellant herein, the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including May 13, 1996, provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:

Kapelke, J.

Sternberg, C.J.

Rothenberg, J.

DATED: April 11, 1996

SUPREME COURT, STATE OF COLORADO
CASE NO. 96SC300
CERTIORARI TO THE COLORADO COURT OF APPEALS, 95CA0507
BOARD OF MEDICAL EXAMINERS, ME9406

ORDER OF COURT

CORNELIUS D. BOYLE, M.D.,

Petitioner,

v.

COLORADO STATE BOARD OF MEDICAL EXAMINERS,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, OCTOBER 15, 1996.

cc:

Richard S. Strauss
HOCCHSTADT [sic], STRAW & STRAUSS, P.C.
2043 York Street
Denver, CO 80205

Robert N. Spencer
Assistant Attorney General
Regulatory Law Section

Patrick H. Stanford, Clerk
Colorado Court of Appeals

COURT OF APPEALS, STATE OF COLORADO
2 East Fourteenth Avenue, Suite 300
Denver, Colorado 80203
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MANDATE

Court of Appeals No. 95CA0507
Agency No. ME 94-06

COLORADO STATE BOARD OF MEDICAL EXAMINERS
V CORNELIUS D. BOYLE

This cause came to be heard on the record on appeal from the Board of Medical Examiners, and was argued by counsel. On consideration thereof, it is ordered that the ORDER of said Court is AFFIRMED.

DATE: November 27, 1996

PATRICK STANFORD
Clerk of the Court

By: /s/ Clifford D. Rowden
Deputy Court Clerk
Clifford D. Rowden

COURT OF APPEALS, STATE OF COLORADO
Certified to be a true and correct copy
Date: November 27, 1996

Patrick Stanford
Clerk of the Court of Appeals

By: Clifford D. Rowden
Deputy Court Clerk